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By the Honourable

Mr. Justice William Renwick Riddell

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THE MEDICAL MAN AS A WITNESS*

THE HONOURABLE MR. JUSTICE WILLIAM RENWICK RIDDELL,
King's Bench Division, High Court of Justice for Ontario.

Some years ago, while yet at the Bar, I prepared for the students in Medicine of the University of Toronto a series of lectures upon "The Doctor in Court," in which I dealt with the medical man as judge, as plaintiff, as defendant and as witness. In the summer of 1903, the officers of the Ontario Medical Association asked me to address that body upon "The Medical Expert as Witness," and I gladly acceded to their request. My address, based as it was upon one of the lectures to the medical students, was given without manuscript or notes, and was really conversational. The stenographer of the Association reported the address; and it appeared in some of the medical journals of Toronto. I had no opportunity of revising the transcript and never saw the address in print until the present year.

When I was asked to address this body on the subject of "The Medical Man as a Witness," I re-read my former remarks and find there opinions to which I adhere, and that what I am reported to have said, discursive as it is, covers much of what I should like to say to-night. It must, of course, not be forgotten that this evening I am addressing an Academy—and ever since the philosopher and his disciples walked in

> the olive grove of Academe
> Plato's retirement, where the Attic bird
> Trills her thick-warbled notes the summer long,

the word Academy or its correlative in other tongues has carried with it the connotation of stateliness and dignity, and not alone true science—although indeed Horace bids "*Inter silvas Academi quaerere verum.*" I must be more formal in speaking to this select few than on the former occasion when addressing the many-headed multitude—noblesse oblige.

But I am sure you will not complain if you find a repetition at this time of something already said, either at the meeting of the Ontario Medical Association or at other times—I am making no pretence of originality.

*Read before Section of Medicine Academy of Medicine, Nov. 8, 1910.

You will, also, not be offended if I speak didactically and not argumentatively. "If I am to listen to the opinion of another," says Goethe, "it must be definitely expressed. Of the problematical, I have enough in myself."

The witness appears in a court—what is a court?

Man is a social animal; and so soon as in the course of evolution he became such, it was imperative that his conduct should be governed by rule of some kind—in short, by law. Obedience to law must needs be considered right: disobedience, wrong, a sin—for wrong and sin were at first all one, "when wild in woods the noble savage ran," as the poet says with unconscious irony.

If a man conceived his rights to have been trenched upon, only two courses might be open. If the force of public opinion (and no civilized man can wholly appreciate the tremendous power of public opinion in a primitive community) should not prove effective to restore him to his rights or to bring about adequate compensation, he might be obliged to avenge his wrongs if he could by his own strong right hand. That is the case when

> "the good old rule
> Sufficeth them, the simple plan,
> That they should take who have the power,
> And they should keep who can."

This is anarchy—"in those days there was no King in Israel, but every man did that which was right in his own eyes."

The other method is the submission of the determination and enforcement of rights to some tribunal—and that tribunal under whatever name it may be known, is in substance a court.

A court is organized and sustained to enforce the law; the law is composed of such rules of conduct as the community think it worth while to endeavor to compel obedience to—whether these rules of conduct come down from the forefathers or are prescribed by contemporary authority. The law is made effective by various sanctions, so that the violator shall pay in "meal or malt," in person or pocket.

A court may be called upon but to determine the law; that is, it may be that there is no dispute as to the facts and the sole question is, "granted that the facts are so, what rights does the law give to the contending parties?" But this is a rare occur-

rence in any court at which a medical man is likely to appear: the cases are by far more numerous in which the real dispute is "what are the facts?" not "what is the law?"—while most cases are contested both on the law and the facts.

It is the latter controversy only, *i.e.*, on facts, in which the witness plays any part.

In our system questions of law are for the judge alone; and with them the jury has nothing to do.

Questions of fact are determined either by a judge or by a jury. In certain classes of cases these questions must be determined by a judge unless the judge directs them to be brought before the jury—in certain other classes they must be determined by a jury if either party desires it—in most cases the determination may be by judge or jury. In this last-mentioned class, if either party wishes a jury, he serves a jury notice; but even then, the judge has the power of dispensing with a jury and trying the facts himself. Perhaps most civil cases are now tried without a jury by a judge alone. In the High Court and at the Sessions, criminal cases are tried by a jury. But whether civil or criminal, and whether tried by judge or jury, the rules are the same.

Certain matters need not be proved, *e.g.*, matters of common knowledge, that the week is seven days, the ordinary year, 365 days—that water runs down hill and smoke ascends—that persons driving when they meet should turn out to the right—and, generally, things everyone ought to know. The judge, too, takes judicial cognizance of the facts of mathematical and natural science and of the laws he is administering.

Outside of such matters and the like, at the present time the jury (I use this word to indicate not only the jury proper, but also the judge sitting to try facts as a jury) must find the facts from the evidence. Centuries ago this was not so; jurors then were taken from the neighborhood of the *locus* of the facts to be tried; and they determined the facts from their own knowledge. Now, however, the very reverse is the case; jurymen are not permitted to utilize their own knowledge at all—they must "find a verdict according to the evidence"—if they have any knowledge of the facts they must, to make that knowledge available, take their place in the witness box and state the facts under oath as any other witness.

Evidence is (1) documentary; or (2) by witnesses. I need not speak of the former, but pass at once to evidence given by witnesses.

There are two classes of witnesses—the ordinary witness and the skilled or expert witness. The former is allowed to speak only of facts within his knowledge: being sometimes allowed to refresh his memory by the use of a written memorandum or entry in a book. He may not express his own belief or opinion except on some particular subjects where positive and direct testimony may be unattainable, as for example, the identity of persons and things, the genuineness of disputed writing, whether two persons are attached to each other, and the like.

Where, however, on questions of science, art or trade, persons skilled in the particular branch of science, art or trade are called upon not only to testify to facts, but also to give their opinions, they are called skilled witnesses, or more commonly "expert witnesses." So far as their evidence is as to the existence or non-existence of facts which can be conclusively established or demonstrated, it is not generally called expert evidence —that name being given to the opinions expressed by them as distinguished from the facts upon which such opinions may be based. Indeed it is by no means uncommon for an expert witness to sit in court and hear the evidence given by others as to facts, and then give his opinion upon the facts so evidenced.

The old jibe, that "there are three kinds of liar—the liar, the d—d liar and the expert witness," had its origin and derives its vogue from this kind of expert evidence, *i.e.*, opinion evidence. And it must be conceded that most of its popularity is due to the performances of medical witnesses.

It is not wholly unjust. There is—there can be—no doubt that the extraordinary antics of some called as medical experts are in many cases a disgrace to the medical profession—and that it is hard to reconcile their conduct with any other theory than that they are in the category of superlative liars—that they are worse than even "adjective" liars.

But too much should not be made of mere differences of opinion. "Doctors differ"; but it is not Doctors of Medicine alone—Doctors of Law are quite as irreconcilable in their views; while I presume it would be hard to find two Doctors of Divinity

who agreed on all points. And Doctors of Medicine have much more reason—"excuse" is not the right word here—than these or those. The divine has one text-book, to whose authority all must and do bow: the facts of his science are laid down in the series of documents constituting his canon: all he has to do, is to interpret that which stands written for his guidance. And we all know the confusion every day worse confounded of the professors of the science of theology. The divisions of the Christian Church show the diversity of interpretation of the one book to which all look as the standard and binding authority. Nor can it be said that these divisions are not the result of honest thought and conviction. Collateral ancestors of my own on both sides were hanged because they refused to belong to a bishop-governed church—they *knew*—the knowledge was a part of their very soul—that the Bible did not justify bishops. And while Riddell and Renwick were on the scaffold I am sure they would, had they had the power, as inflexibly have inflicted the punishment of death upon those who did not believe as they, and who tolerated a bishop as a ruler and a governor over the Church. Persecution is said to be a very easy form of virtue: but not for the persecuted. All history for centuries is full of persecution and martyrdom for opinion—the Jew persecuted the Christian when he had the power—his descendants for fifty generations have suffered violence and oppression at the hands of the disciples of the religion of love: the Roman Catholic tortured the heretic in Bohemia and Spain and England: and the heretic triumphing, revenged himself or his fellow by retaliation on the innocent fellows of his torturers: the Episcopalian persecuted the Scottish Presbyterian, the Presbyterian persecuted the Baptist in parts of New England: the Baptist (it is said) drove out the Quaker from Rhode Island (or tried to). And if the Quaker has never persecuted anyone, it must be remembered that he has never had the power. Even in the non-Christian land,

> "For the love of Him, nation hates nation so
> That at His shrine, the watchful Islamite
> Guards Christian throats."

The fate of John Hus or John Wiclif was no worse than that of Servetus, the philosophic physician and brilliant scholar, or of

Campion, the enthusiastic Jesuit and pure-minded Christian. Even in our own day I am not sure that the *odium theologicum* has much decreased. It is true that there is no longer the stake or the rack, but would the spirit shown by some at least of those who have taken part in the controversy now or but lately going on disgrace Torquemada or Claverhouse?

In law, too, there is the same divergence. It is true that the lawyer has not but one collection of little pamphlets to look to for his ultimate and inexpugnable authority—but his authorities are all well known, numerous as no doubt they are. They are authorities some of which at least are binding, although some are more commentary than text. "If it is law it will be found in our books. If it is not found there, it is not law," said Lord Chief Justice Camden. And yet it is not the common, but rather the unusual case that lawyers or judges agree. Take for an example the latest case of my own which went to the Privy Council In the interpretation of an Ontario statute upon the subject of insurance, I decided at the trial the meaning of certain words in an Ontario Statute in a certain sense—the Court of Appeal unanimously supported that judgment—in the Supreme Court two judges thought I was right, but three thought I was wrong—the Judicial Committee of the Privy Council thought the majority of the Supreme Court wrong. In the latest case in which I have taken part in a judgment in an appellate court, the inferior court decided against the plaintiff: a Divisional Court composed of three able and careful judges gave a considered judgment reversing the decision, two of the judges being for reversal *in toto,* the third for reversal in part: in the Court of Appeal, composed of five judges, no judge could be found to agree with any of the judges in the Divisional Court. I know personally, and have sat with, all these judges, and can bear testimony, not only to their intellectual power, but also to their anxious desire to find out accurately what the law is—and yet how different the conclusions. There have been cases in which the plaintiff or defendant was successful alternately in the courts on appeal, and the party ultimately successful perhaps achieved his final triumph only because there was not another court to go to.

Now these were cases in which no troublesome question of fact

was involved—the facts were admitted or had been conclusively established—all that was before the courts was a question of dry law. Nor were there any such matters involved as would tend to arouse racial, religious, social or political feeling, any of which might unconsciously sway the judgment—no idol of tribe or idol of the den or idol of the market-place or idol of the theatre to blind the eye or mislead the soul. *"Quatuor sunt genera Idolorum quae mentes humanas obsedent . . primum genus Idola Tribus, secundum, Idola Specus, tertium Idola Fori, quartum, Idola Theatri vocentur."* Francis Bacon himself could not in the cases I have referred to have discovered any fifth kind of Idolum to exercise its dire influence—nor could Roger Bacon have found any *"offendiculum veritatis."*

In the world of statesmanship—of politics, the like conflict of opinion may be found.

The poet sings:

> "I often think it's comical
> How nature always did contrive
> That every boy and every gal
> That's born into this world alive
> Is either a little Liberal
> Or else a little Conservative."

And with the one class "All baronets are bad," while with another, "The man who bites his bread or eats his peas with a knife, I look upon as a lost creature", "the poor in the loomp is bad."

No truth is more profound or better attested than the old one, *"Tot homines, quot sententiae,"* "So many men so many minds"; or, as Terence has it, *"Tot capita, quot sensus,"* "So many heads, so many opinions," or do you prefer Cicero, *"Quot homines, tot causae"?* (No doubt a medical audience would prefer Cicero's version if he were using *"causa"* in the medical sense of "disease"—for then the remark would mean "every man has his own particular failing.")

The African king upon whom the spirituelle and sylphlike English lady had, with a most generous display of charm of body and mind, lavished her wiles, yielding to her winning ways,

said: "Ah, you would be irresistible if you were only fat and black."

"*De gustibus non est disputandum.*" *Sed* "*neque de disgustibus,*" and I add, "*neque de opinionibus.*"

Why then expect expert witnesses to agree upon matters of opinion—whether they be practitioners of medicine or otherwise?

It is the first duty of a witness to tell the truth—the oath is "The evidence you shall give . . shall be the truth, the whole truth and nothing but the truth." The words of the oath are not to be taken quite in the ordinary sense. When an accused person pleads "Not guilty," this is not in law a denial of the fact that he has committed the offence charged against him; but it is only a statement to the effect, "I do not admit that I committed the offence charged: prove that I did, if you can"—so the witness is not supposed when he takes the oath to be undertaking to say all he knows—the oath paraphrased would read thus: "What you shall say in answer to the questions put shall be true and, being true, shall neither be a concealment of anything else that is true nor a suggestion of anything else that is false." To use the accepted legal terminology—the answer shall not only be true so far as it goes, but it shall contain no *suppressio veri* and no *suggestio falsi*. For example, in a case in which an unmarried woman is suing for damages for a leg broken through the negligence of a railway company, her doctor when asked, "How did you find the plaintiff after the accident?" should not as a rule say "I found her with a broken leg and enceinte." If he left out the latter fact he would indeed not be telling "the whole truth" in the popular sense of the words, but he would in most instances be doing so in the legal sense. If, however, (for instance) the damages claimed were based in part upon her being forced to remain for a long time in her room and the condition of pregnancy contributed to this, the witness would be guilty of a *suppressio veri* were he to omit to disclose the fact. So, if the witness is asked, "After your examination of this girl, are you prepared to swear that she was not with child?" and he were to answer, "Well, I am *not* prepared to *swear* that," and say nothing more, he might be guilty of a gross *suggestio falsi*—he would be, if he had carefully examined her without any thought of anything of the kind, and without suspicion having been aroused,

if he did not add, "but I have no reason for thinking she was," or something of the kind.

But telling the truth is not the only duty of a witness. He owes it to himself and to the truth itself not only to tell the truth, but to make the truth tell—*i.e.*, to make his evidence effective. Now by this I do not mean that a witness should take sides—the eager, the partial, witness is too often dishonest and is always discounted; and nothing is more nauseating than to see and hear a witness stretching the facts, and in the ardor of his partizanship narrowly, if at all, escaping perjury. What I mean is, telling the truth in a manner as persuasive as possible, and as likely as possible to induce belief.

Speaking in general terms, the witness is called upon only to answer questions.

I on another occasion laid down three rules which it would be wise for witnesses to observe; and I now repeat them:

First, "Understand thoroughly the question put, before attempting to answer it." If you do not thoroughly understand a question, have it repeated, interpreted or explained until you do. If the lawyer refuses to repeat or explain, appeal to the judge—you have your rights, and he will see to it that you are given them. If the question is ambiguous, you have the right to have the ambiguity removed. Do not, however, be hypercritical—do not dishonestly pretend not to understand a plain question because it chances to be an awkward one—nothing more prejudicially affects the value of a witness' testimony than an obvious desire to fence or to spar for time. Apply your mind honestly to the matter of the question and honestly endeavor to understand it—if the question is in reality unambiguous, do not dishonestly pretend to think it is ambiguous.

Again, "Having thoroughly understood what is asked, answer it as briefly and concisely as you can, consistently with the truth without suppression of the true or suggestion of the false." If the question can be answered "yes" or "no" without some implication which is untrue, some *suppressio veri* or *suggestio falsi,* answer it "yes" or "no"; if it cannot, do not hesitate to say so. Say that an answer "yes" or "no" would convey a wrong impression; and refuse, however much pressed, to answer in a way which carries an implication of untruth. Do not heed

the demand, so often made with an air of righteous indignation, for a plain answer to a plain question. It is a common thing for lawyers to insist that any leading question can be answered "yes" or "no" without any suggestion of the untrue: but try this one—"Have you quit beating your wife yet?" Many a witness has yielded to importunity and answered "yes" or "no," when in his soul he knew he should not—this is morally if not legally equivalent to perjury. But again do not be hypercritical—you will in many cases be told to answer "yes" or "no," and you will have an opportunity of explaining and amplifying later. Insist upon the opportunity, in justice to yourself and to the truth.

Remember, however, that it is the question put to you that you are to answer, not something else. Doctors are very prone to sin in this regard—called upon to testify as to facts, they indulge in opinion—asked to give an opinion of something rightly within their competence, they give an opinion upon something which is not. Time and again, I have heard doctors in cases in which insanity is set up, not remaining content with giving an opinion as to sanity in the legal sense, go on and say that the prisoner in their view should not be punished, but should be treated for the disease. That is not for the doctor, or, indeed, for the judge either—it is for Parliament and the Executive.

Third, "When you have answered the question, SHUT UP." No witness is so dangerous to his own side or so much the prey of counsel on the other as the talkative witness—the heart of counsel leaps with joy when he sees his learned brother on the other side trying in the examination-in-chief to stem the flood of talk from a loquacious witness. It has been my own experience that no small proportion of cases are won and lost by some witness talking too much.

Now these seem rules simple to the verge of silliness—or over the verge; but if they were observed, I am confident that the time occupied by trials would be diminished by one-third or more. Go into a court of justice and you will see witnesses failing or refusing to understand what they are asked—answering something entirely different, and talking at random long after they should have been silent.

As part of the duty to make the truth tell, the witness ought

not to disregard any legitimate means of impressing the trial tribunal. For this, as well as for other reasons, he should avoid jesting and frivolity—the matter that is going on is a serious one: and there is seldom room for humor and more seldom still for wit. Few, if any, judges appreciate any wit or humor but their own; and judicial wit and humor are well known to be the lowest species of either. It is rare, too, that a jury does not form a poor opinion of the joking witness.

It is said that the English-speaking people of this continent are becoming a race of jesters—and there is much truth in the charge. 'Tis true, 'tis pity; and pity 'tis 'tis true. Still the line is to be drawn when an oath is taken. If there were no other reason, there is at least this—it is seldom that wit or humor can be successful without exaggeration of fact or the use of words in a metaphorical or unusual sense—either should be absolutely tabooed in the witness-box. The medical man should not complain that he is not permitted to display his wit—the law is and should be no respecter of persons, and if one man may joke, so may another, and our courts degenerate into a raree show instead of remaining a temple of justice. There is nothing which impresses a jury or a judge more than the quiet dignity of a self-respecting man—respecting himself, he is willing to respect others and he inspires respect in others. No counsel, however bumptious, can make headway against such a witness. Lord Mansfield says, "Ingenuity is one thing and simple testimony another, and plain truth needs no flowers of speech."

Nor should a witness think or pretend to think that his answers are for the information of counsel—questions which require no answer to men of education, as both lawyers and doctors are expected to be, may need to be fully answered for a common jury to understand the matter. A question is never asked—or seldom—that counsel may understand, but either for the information of the trial tribunal or to test the witness himself. In either case a straightforward, plain answer has the best effect; and nothing is gained by indignation at an apparently unnecessary question or by omitting to answer. "You must answer any questions that are not ensnaring questions."

The language in which an answer is framed is not without importance. I do not know that we are any more given to slang

than other peoples—I find as much in London and New York, in Montreal and St. Louis as in Toronto—perhaps more. But there can, it seems to me, be not much doubt that this age uses more slang than any preceding one. Slang is said to be language in the making; and, of course, much that was slang has now become good English—but in a court of justice there is no more need of using language which is in the process of manufacture than in using customs which are in the same condition and have not yet crystallized into law. One very serious objection is that until the words have become old and thoroughly incorporated in the language, one person uses or may use them in one sense, another in another. Ambiguity is always a curse, and not less so in evidence than in aught else. I am not sure, either, that the slangy doctor impresses a jury any more favorably than the jester.

There is, however, another fault into which the medical man is prone to fall—I mean the use of highly technical language. Of course medicine, like every other art and science, has its own terminology, which it is wholly natural for its professors and practitioners to use. But much of it is "caviare to the general"—whether it be of Latin origin or not, it is Greek to a jury. Much may need to be couched in technical language for reasons of delicacy, or accuracy or the like: but "bruise" is just as good as "contusion," "bleeding" as "hemorrhage," "broken arm" as "fractured humerus." Wherever an accurate impression can be conveyed by the use of common language, common language should be used—where technical nomenclature can alone give the right idea, do not hesitate to employ it.

And remember always that you are not giving a lecture upon the subject or explaining matters to professional brethren—you are stating facts to be comprehended by the laity. If you do not make the trial tribunal understand you, of what avail is all your knowledge and learning?

The appearance of a witness is not without its importance—neatness of dress, cleanliness of person, are not less pleasing in the witness-box than elsewhere. There is a philosophy of clothes, and Shakespeare knew it:

> "Costly thy habit as thy purse can buy,
> But not expressed in fancy: rich not gaudy;
> For the apparel oft proclaims the man."

Neither fop nor sloven can impress a jury like one dressed as a gentleman—though he may have all the learning in the world, he is handicapped by his outside. "The jay" is "not more precious than the lark because its feathers are more beautiful . . . the snake more precious than the eel because its painted skin contents the eye," but, on the other hand, the wise old proverb has it, "*Vestis virum facit*," and "Through tattered clothes small vices do appear; robes and furred gowns hide all." Goethe was wise in his generation when he said,

"Der Schein dem was ist er, das Wesen fehlt?
Das Wesen wär' es wenn es nicht erscheine?"

To do justice to himself, the witness should not omit to consider his physical condition. A doctor is supposed to be always in perfect condition, but there may be exceptions—I think I remember having seen some—in any case, the strain of a prolonged and strenuous cross-examination will test the strongest witness, especially if his nerves are a little on edge. A surgeon who expects to perform a critical operation will generally avoid stimulants or other "disorganizers." Does he follow the same rule when he is about to go through an ordeal as trying in some respects—in which, as in the operation, a slip may cost a life, or, if not, may at least prejudice a future?

The witness should prepare himself by reference to any notes or memoranda he may have made, by reflection on what took place, by examination of authorities to back any opinion he may have formed. Do not despise the counsel who is to cross-examine you: he may not know much about your science generally; but for the particular case he should, and if he has done his whole duty he does, know as much as you, and perhaps more. To the counsel who examines in chief be clear and accurate; but to the cross-examiner, as you value your peace of mind, be, if possible, even more so—do not fight with him, that is his business, and you cannot hurt him, though he may hurt you—be courteous and firm—don't hedge—do not make a pretence of omniscience—if you do not know a thing, do not hesitate to say so—no one will think the worse of you—be quiet, cool and dignified, and you are safe. Of course the lawyer will be irritating and will try to make you lose your temper or your self-control, but that is part of his

policy—do not let that affect you. Do not joke with him even if he try to joke with you—it is not his desire to show himself friendly to you that influences him—he is after your scalp—if he can make you "play the fool with mirth and laughter," it is likely he will get something from you that you should not give. If you reply in slang or ambiguous language, he will be apt to use the words in a different sense from that in which you used them. If you give a plain, serious answer in good English, he can make no more of it than he in justice should.

There are many complaints about cross-examination, and some may be deserved; the privileges of cross-examining counsel have sometimes been abused, as every other right may be abused.

But let us see what cross-examination really is. It is not as so many, even some lawyers, seem to think, "examining crossly." Cross-examination is the art of searching by questions into the mind of a witness in order that the trial tribunal may see, first, what the witness really means, and, second, how far what he says, may be relied upon.

There are many things to be taken into consideration in determining how far a witness can be relied upon. It must be plain that it would not do to allow him to state in his own way what he desired to say and then let him go. He might forget important parts of the story, he might load it with irrelevant detail, he might speak loosely where exactness was imperatively required, he might express opinions where he was called upon to state facts, he might guess or imagine where he should know or say he knew where he only fancied, he might state as fact what he had only heard—all these dangers and many more are ever to be guarded against.

Nor would it do to allow the story to be told under the guidance of counsel for the side for which the witness was called, with nothing more. No one who hears a witness tell his story under the hands of a skilful direct examiner (and direct examination is to my mind a more difficult art than cross-examination, and it is rarer to find a first-class direct examiner than a cross-examiner who deserves the same praise), but must be struck by the beauty and symmetry of the structure built up, and almost grieve to see it fall in pieces before counsel on the other side. Some way of testing the accuracy of evidence must

be provided—and no means yet discovered can compare for a moment with cross-examination. No doubt injustice will sometimes result both to the witness and to the side for whom he is called, but in the vast majority of cases the evidence of the honest witness is not weakened, but it is strengthened by a rigorous and searching cross-examination—while the evidence of dishonest or incompetent witnesses is in numberless cases weakened or destroyed. "None but the sore feel the probe."

Nor is it only the dishonest witness whose evidence needs probing. The value of the evidence of a witness may and often does depend on much more than his honesty. There is first to be considered the witness' opportunity of knowing the facts. He may have been in the immediate presence of the actors or a distance away; he may have made a careful or a merely cursory observation or examination; it may have been clear daylight or the gloom of night—and many other circumstances may have to be considered in this view.

Then his capacity of understanding what he did observe—see or hear or feel—or his capacity to form an opinion of any value. His general intelligence, his education, his training, are all of importance in this enquiry.

Again, in observing fact or forming opinion, is he consciously or unconsciously swayed or influenced by social or moral, religious, political or racial prepossession or prejudice? The common impression amongst sellers of liquor is that no strong temperance man or prohibitionist can, in cases of alleged illegal sale of intoxicants, see things as they really are. I do not say that this is true, but it will illustrate my meaning.

Has the witness any pecuniary interest, or interest of any kind, direct or indirect?

Then what kind of memory has he? Does he in fact remember what he says he remembers? Has he the reproductive and representative faculties of the mind so well developed and in such good condition that he can call to mind what did actually happen? Or is he only indulging in fancy and imagination?

And is he really expressing his thoughts by the language he is employing? It may seem an extraordinary statement to make, but it is undoubtedly true that not one man in twenty appreciates the value of an accurate use of language, and not one man

in twenty can express precisely what he means so as to exclude the possibility of mistake.

Most important of all is honesty. I am glad to say that as a general rule medical witnesses are honest. Any witness who will give evidence contrary to the fact as he understands it or contrary to his real opinion, either to help a plaintiff to obtain a verdict when he should not, or a larger verdict than he should or to help a defendant to escape the legitimate consequences of wrongdoing is a thief; he is a criminal and should just as truly be behind the bars as the man who opens the vaults of a bank with dynamite. Expert witnesses will sometimes give testimony which is certainly a tissue of lies—no doubt were they prosecuted for perjury, they would shelter themselves behind the plea that they were giving an opinion only and not swearing to a fact—thus ignoring the truth that the existence or non-existence of an opinion is itself a fact. Perhaps the most striking and most shocking examples of this are in criminal cases where the defence of insanity is set up—the mention of such cases gives me a bad taste in the mouth, and I say no more.

And just here let me refer to something which is not uncommon—I mean exaggeration—which is a form of lying. If you do not believe it, read "Opie on Lying." Many witnesses appear to think that the trial tribunal will probably strike an average of the professional opinions given—they consequently exaggerate their own so that it may have the greater weight.

Some, too, do not seem to place any value on language, and while there is in their terminology a distinction between "yes" and "no," words of a less definite and fixed value are not distinguished. There is a difference between black and white, but dark-grey is with them one or the other, depending sometimes, and too often, upon the side which calls them.

Sometimes there is apparently an attempt to take advantage of the supposed ignorance of judge or jury. For example, I have heard a medical man (who should be an expert) solemnly swear that anyone who believed in the possibility of communication with the spirit world was necessarily insane and incapable of managing his affairs. It was useless to refer him to intellectual giants from Socrates to Sir William Crookes and Sir

Oliver Lodge or to business men like Stead—he stubbornly held to his opinion—or what he said was his opinion.

Such evidence as this is wholly harmful and improper—to use no stronger words.

Now, cross-examination is directed to the sifting of the evidence given so as to find (as has been already said) what the witness really means and how far what he says and means may be relied upon. Medical men should not complain that they are subjected to the same treatment as other witnesses. There are numberless cases in which not only straight perjury, but also concealment of the truth and false suggestions have been made plain by cross-examination, and cases are not unknown in which medical men of apparently the highest standing are shown to have permitted themselves to express opinions wholly opposed to the well-recognized facts of their profession—opinions which no competent medical man could possibly entertain.

And as the court is either conducting what should be a stern and careful investigation into an alleged offence against the people or is engaged in a civil case in what is the civilized substitute for a physical and personal combat between the contestants, and as each counsel is upon honor to do all he legitimately can for his client, no witness can ask that cross-examination shall be but trivial and not a trying ordeal. Lord Bramwell said, "It is well for the sake of truth that there should be a wholesome dread of cross-examination." I agree with him: this dread of cross-examination must undoubtedly tend to greater care in the giving of evidence on the direct examination: and tend in general to make such evidence of greater value.

In much of what I have said, I have not distinguished between the doctor as an ordinary and as an expert witness. There is, however, one consideration in the latter case which perhaps deserves a word. The scandalous exhibitions of irreconcilable differences of expert opinion have called forth many comments: and it has been suggested that some remedy may be found. For example, I copy the following from a thoughtful article in a daily newspaper:

"Expert Testimony."

"There is some danger that the medical profession will be discredited by the competition for expert witnesses in damage

suits and criminal cases before the courts. In some instances the witnesses seem to become advocates for one side or the other, and the conflict of opinion does not tend to confidence either in the courts or in the profession. Is it impossible to have a physician or a board of physicians of high standing appointed by the Crown or retained as crown counsel are retained in criminal cases? If this is practicable (and there may be many objections which we have not considered), the evidence of such experts would be available alike for prosecution and defence. Judges and juries would have reports in which they could repose a greater degree of confidence, and in many cases perhaps a sounder administration of justice would be assured."

In certain criminal cases this is now the practice in Ontario. Wherever a crime is thought to have been committed and the accused is in custody—if there be any room to suspect his sanity, or if it be suggested that his defence may be insanity, two experienced alienists in the employ of the Ontario Government are sent to examine and report—these are not advocates, and their whole duty is to determine the exact fact. They are at the disposal of the defence, as well as of the prosecution, and in my experience they have been sometimes called for the defence. So, too, in cases of suspected poisoning, there is an analysis made at the instance of the Crown. No one has ever challenged the absolute honesty and fairness of the present analyst—his evidence is at the disposal of the defence, in the same way as that of the alienist.

But even in these cases, neither party is bound to accept as conclusive the evidence offered by these experts. Others may be, and often are, called: and I should consider it a most dangerous practice to hold any person bound by the opinion of any expert, however able and honest. In matters of insanity, *e.g.*, men of equal ability, skill, experience and honesty may and often do entertain different opinions—while even in matters of chemical science, it should not be forgotten that a most careful, conscientious and capable chemist was forced to admit that arsenic he found upon his analysis came from his own reagents. Science is constantly advancing: and it may well happen in the future as it has happened in the past that the official expert falls behind the younger and non-official enquirer. Even in matters

of law, the people are not, and should not be, satisfied with one expert—a trial Judge finds his opinion appealed against to a Divisional Court—the judgment of that Court is reviewed by the Court of Appeal: and it may be, the Supreme Court of Canada and the Judicial Committee of the Privy Council are ultimately required to determine what is the law. Law, too, as we have seen, is a science in which the theory is that somewhere in the books, if diligently sought for, will be found a decision or a principle which will conclude the case under consideration. How much more then should a litigant or an accused be at liberty to contest the opinion of an expert in a science which is living and ever growing—in which discoveries are being made yearly—I had almost said daily and hourly?

It must be, then, that other than the official experts may be called: and this should, as it seems to me, be fatal to any idea of an official, individual or collective, being appointed as a standing referee upon scientific question. In all but the exceptional cases mentioned, each party must under our practice procure his own experts: and while it cannot be said to be wholly satisfactory, I have not yet seen any scheme proposed which is at all feasible.

But we do not expect any human institution to be without faults; and Courts are human. The Judge may never have known or may have forgotten some principle of law—an old Judge said: "God forbid that an attorney or even a Judge shall be considered to know all the law." The jury may be swayed by sympathy or prejudice, or may be unintelligent or misled, and may perversely find a verdict not according to the evidence: and it is too much to expect that any method of giving any kind of evidence, expert or otherwise, will be perfect. "No system of judicature can be devised or suggested in which occasionally failure to insure complete justice may not arise."

So much had been written when I was favored with the perusal of the address of your President, given on October 4th of the present year; out of courtesy to him, it would seem proper that I should say a word or two in respect of his remarks. He says:

"The position of the medical (so-called) expert witness in our courts of justice has always appeared to me to be an ano-

malous one, brought about partly by the practice of allowing lawyers to cross-examine in such a way that it is hard for any but the most astute to avoid giving a wrong impression and partly by the practice of taking sides. For doctors to enter the witness box and testify to one opinion for a fee, whilst others swear to an opposite opinion for a larger fee, is not in the best interests of the profession, and is hard to reconcile with the best interests in the course of justice.

"I have long held the opinion and still hope that the so-called medical expert will be abolished and the medical advisers will be employed by the Crown instead. In that way his position would not be in any way that of an advocate for either one side or the other, but would be entirely judicial, and his whole object would be to help the presiding judge to a correct understanding of the intricate medical problems presented. I believe that in this way the real cause of justice would be furthered."

With great respect for anything Dr. Macdonald could say, it seems to me that he has fallen into errors which, considering his point of view, are not wholly unnatural. He says that the position of the medical (so-called) expert witness is an anomalous one. This is incorrect—his position, so far from being anomalous, is entirely normal; and it is the same as that of an expert witness in any other art or science, chemistry, mechanics, electricity, painting, veterinary surgery, dressmaking, even law itself—(that is foreign law, the Judge is himself an expert in his own law)—and if a medical adviser is to be appointed, why not a chemical, mechanical, veterinary and artistic expert? As to helping the presiding judge to a correct understanding of the intricate medical problems presented, I deny that there are such problems. At the peril of being considered guilty of *lèse majesté* against Queen Medicine, I assert that there are no intricate medical problems ever presented to the courts or any medical problems at all which cannot be understood by a judge of ordinary intelligence and education. Medicine, my friends, has passed the stage of mystery and occultism—it is now a science of common sense, and there are no arcana sacred from the intrusion of the layman. No priest of the cult can cry *"Procul, o procul este, profani,"* nor may two augurs meet and

join in smiling congratulation while each whispers "*Odi profanum vulgus et arceo.*"

How is the expert to be appointed? By the Crown? That means by the Government for the time being. In our system of party government, is the best man always appointed? Is the Deputy Minister of Justice, or the permanent adviser of any Minister, always at the head of his profession? Are the members of the medical profession themselves in all cases perfectly satisfied with and content to be bound by the evidence given by some who are frequently called as witnesses by the Crown.

Or are the experts to be appointed by the judge? I know of judges who would always feel disposed to appoint a Homoeopath—others to whom Hahnemann is anathema; one of my own old perceptors was an Eclectic, and had an exalted opinion of the virtues of Thompson's No. 6.

Or are they to be elected by their brethren? You have now a Council elected: and it seems to me that I have somewhere heard that it is just possible some of the electors were not wholly satisfied with their representatives there. Indeed, if I am not under a mistake, some have even gone so far as to speak out in no uncertain tones their thorough dissatisfaction.

The reprobation of the practice of cross-examination, I have already alluded to—the medical man must altogether repudiate any idea that he is a judge in a Court of Justice; and he must submit to having his views challenged and all reasonable tests applied to determine the real value of his evidence. Is the ignorant quack to be spared exposure of his ignorance and pretension just because he has the letters "M.D." after his name? And who without cross-examination knows but you are as ignorant as he? He will be as pompous and impressive as you can be. Who can tell your worth till he tries?

Courts exist not for the witness any more than for the lawyer or judge, but for the litigant—and it is the interest of the litigant alone which is to be considered—his interest is the interest of the people who pay for the courts.

Medical men must face the situation—so good a friend of the profession as I, may be pardoned a little plain speaking. A great deal of the odium attaching to the expert medical testimony is due to natural difference of opinion and is consequently

unjust: most of it is not. For the most part it is due to medical men themselves, and the remedy (so far as any remedy is possible) is in the hands of the medical men also. The trouble in the main arises from two causes. First, downright ignorance. The very high standard of professional attainment reached by the practitioners of medicine in our Province is well known, and I am proud of it, as everyone should be: but it must be admitted that there are exceptions. Some there are who cease to be students the day they pass the Council; some who during their course in college are satisfied with the minimum required to pass the examinations. They are, and they remain ignorant. Again, and it pains one who respects and esteems the medical profession as I do, to say it—there is often absolute dishonesty in the medical as in every other kind of expert. Your president had been drinking of the waters of sweetness when he said, "For doctors to enter a witness box and testify to one opinion for a fee, whilst others swear to an opposite opinion for a larger fee, is not in the best interests of the profession, and is hard to reconcile with the best interests in the cause of justice" (unless, indeed, Dr. Macdonald was speaking of honest and well-considered differences of opinion). If these "opinions" were dishonest, the doctors were perjurers—if formed without careful consideration, they were pretenders—in either case a disgrace to the profession. If the opinions were honest and well-considered, how determine which was right? And how remedy the difficulty? By leaving it to another expert equally fallible?

Let medical witnesses be masters, as they should be, of their science, and practice plain, simple honesty; and most of the scandal will disappear.

But as I have already said, difference of opinion must be expected. Medicine is not mathematics, not an exact science—and it is not and never can be a matter in which authority is supreme.

There is no prospect of medicine becoming anything like an exact science until—and unless—experiment be permissible upon the human frame. This cannot be done now—the doctor treats, he does not experiment, he is in duty bound to do the very best for that particular patient, not for medical science generally.

Nor can, or should, medicine become a matter of authority. Hippocrates was a radical in his day, and doubtless shocked the schoolmen of the Aesculapian College. Celsus was no better; and Sydenham on Fevers was revolutionary. Paracelsus and Van Helmont were not simply quacks*. Ambrose Paré and Harvey and Jenner and Simpson were all heretics. The physician who, a hundred years ago, would reprobate bleeding freely and for practically every mortal ill, would be scouted as an ignorant and presumptuous pretender.

We must, I think, "Rather bear the ills we have, than fly to others that we know not of"— and be content with our present system till we can get a better.

What is the remedy? The judge may become more diligent and make more extended or more careful enquiry into his authorities—the jury may cast out all feeling of sympathy, prepossession and prejudice, and all else than a real desire to do justice according to the evidence: and the expert witness, I think, can help by being always, not only learned, but also independent, impartial—in a word, honest. But even then, I repeat once more, opinions must be expected to differ.

I could go on by the hour addressing you upon this subject, but I have been already too long and must now stop.

In conclusion, let me wish the Academy all success, and let me venture to hope that none of its members will bring disgrace upon it, himself and his profession by dishonest or slipshod testimony. If the aristocracy of the profession are beyond reproach, the commonalty will follow in their footsteps, and the profession at large be freed from a reproach not wholly deserved, but having but too well established grounds for its existence.

An exceedingly hearty vote of thanks was passed by all the Fellows present, moved by Dr. N. A. Powell and seconded by Dr. A. A. Macdonald.

Mr. Justice Riddell, in replying, said in part:

"I have entirely failed in one chief object of my address tonight if I have not made clear that the members of the medical profession must take hold of this matter of expert evidence themselves.

"The Judges cannot help you, they are bound by precedent;

the lawyers will not, they have their account in the disagreement of experts; the legislature cannot be expected to give medical men as witnesses a position different from or superior to that of any other class of the community.

Now, while there are, of course, black sheep in the medical as in every other profession, their number is not great; and with the exception of these few, I am confident an enlightened regard for truth, for the good of the public and of the profession, must be all-powerful. Even the black sheep have some regard for their general repute among their brethren. If they knew that a doctor who gave a dishonest opinion would be shunned and scorned like any other perjurer even their conduct would be more nearly honest.

"There is no reason why medical experts should not stand at the very head of all expert witnesses, as they ought, instead of being, as they are, at the very foot. And I am not entirely without hope that the day is not far distant when such will be the case. If anything I have said will help, in however small a degree, to speed that day, I shall feel amply repaid."

NOTE.*

Let me explain what I mean.

Paracelsus had a vulnerary ointment or weapon-salve made after this recipe: "Take of usnia (*i.e.*, the mossy growth upon the weathered skull of a criminal, who had been hanged and left hanging in the air), of real mummy, of human blood still warm, of each one ounce; of human suet, two ounces; of linseed oil, turpentine and Armenian bole (*i.e.*, a kind of clay found native in Armenia, an impure silicate of aluminium containing considerable oxide of iron), of each two drachms. Mix all well in a mortar, and keep the salve in an oblong narrow urn."

Van Helmont and others had different formula, using the fat of bears, bulls or wild boars, powdered earthworms and other like delectable materials.

A wound was treated by anointing the weapon which caused the wound, or if that was not available a splinter dipped in the patient's blood, with this ointment; and the weapon or splinter was then laid away in a cool place.

In the meantime, the wound was to be carefully washed with fair clean water, covered with a clean, soft, linen cloth, and cleansed once a day from pus and other impurities.

The theory given out was that the dead criminal or animal died full of secret reluctancy and vindictive murmurs and with a high flame of revengeful feeling. This continued after his death, and the posthumous character of revenge remained firmly impressed upon the blood and fat in the unguent. The moment the blood on weapon or splinter came in contact with this most malignant substance, it was roused to active excitement, and so obtained full power to cure its fellow blood left behind in the wounded man; and this it did by sucking out the dolorous and exotic impression from the wound.

I do not believe that Paracelsus really held any such theory; but mysticism was the fashion of the time, just as giants were the fashion in literature, when that other great physician, Rabelais, wrote, and so, of course, Rabelais had to write about giants in that astounding book abounding in pearls of wisdom, unfortunately, however, to be sought for in a bucketful of filth. Patients then required magic as they still require medicine. Then a wounded man would have been as much disappointed and dissatisfied by simply having his wound washed as a typhoid patient would now be without something to take besides care. Placebos have and always had their place in your science.

If any one desires to know the treatment of wound, *secundum artem,* at that period, let him read the story of John Ridd in Blackmore's "Lorna Doone."

Until Lister's time, no better treatment for wounds was ever known than that of Paracelsus and his imitators; and they knew and recognized the value of impressing the imagination. They were called "quacks," and were subjected to the ridicule of the regular profession—so was Sir Kenelm Digby in England, who cured wounds in much the same way. He took any article which had been dipped in the wounded man's blood and put it in a solution of a powder of vitriol—"powder of sympathy" he called it—and directed the patient to throw away all plasters from his wound, only to keep the wound clean and at moderate temperature betwixt heat and cold.

Had the patient died under the treatment of Paracelsus or Digby, the Royal Physicians and Surgeons and practically the whole profession would have given entirely honest evidence that he died from *mala praxis*.

If a patient were to-day treated as practically all surgeons of that day treated theirs, and died, his medical attendant could not escape conviction for manslaughter, let alone have a defence to a civil action for damages.

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Riddell, William Renwick
The medical man as a
witness

Biological
& Medical

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